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PROFESSIONAL FEES IN PRIVATE PRACTICE: THE QUESTION OF REGULATION

HIGHLIGHTS

Office des professions du Québec

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FOREWORD

The purpose of this document is to highlight the main features of the report "Professional Fees in Private Practice: the Question of Regulation" published by the *Office des professions du Québec*.

For a fuller and more detailed treatment of the topic, the reader is referred to the original report which may be obtained, without charge, by writing to:

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Introduction

With the adoption of the Professional Code in July, 1973, the responsibility for suggesting regulatory tariffs of fees, or fee schedules, to the government was transferred from the professional corporations to the *Office des professions du Québec*. The importance of the matter and the lobbying by the professional corporations led the *Office* to begin studying the subject as early as 1974. Following preliminary research carried out at the *Université de Montréal* by the *Centre de recherche et développement économique*, public hearings and research work undertaken by the *Office* itself, a report entitled "Professional Fees in Private Practice: the Question of Regulation" was submitted to the government.

The report outlines the *Office*'s conception of the public interest in regard to professional services. The *Office*, for one, believes that public protection in this area involves, basically, two points: first, the quality of the professional services offered, and, second, the effective distribution of these services and their availability and financial accessibility. This last aspect

is especially important as the power to establish tariffs of professional fees has significant economic effects, when exercised, and directly affects the public as consumers.

1.0 Establishing fee schedules for professionals

The *Office* began by posing some basic questions concerning the true objectives of the regulation of professional fee schedules. Is a tariff necessary to protect the public or is it even useful? Is not its main effect rather to protect those who provide professional services? Would not the public interest be better served by measures designed to reduce the price of services or keep them from increasing?

In brief, the *Office* studied the foreseeable effects of various kinds of fee schedules on financial accessibility, and on the quality and availability of professional services provided by private practice. Let us first examine their conclusions on the compulsory minimum tariff.

1.1 Compulsory minimum tariffs

As far as the *Office des professions* is concerned, it is obvious that a compulsory minimum fee for professional services gives an economic advantage to the professional, not the client. Such a tariff may lead to an increase in the price of services without a compensating guarantee of availability and quality.

1.1.1 The effects on fees

Adopted most frequently by the professional corporations in the past and still the most sought after nowadays, the compulsory minimum tariff fixes a "floor price", thereby prohibiting the professional, on pain of disciplinary measures, from charging less than the established tariff — although he may charge more. Thus any competition can only increase fees.

By setting a minimum tariff slightly lower than or equal to the lowest tariffs found on the market, it becomes impossible to reduce fees in the case, for example, of an increase in supply or a decrease in demand.

Furthermore, if the minimum tariff is set above the lowest price on the market, it gives the professional a yet greater advantage by enabling him to set and maintain inflated prices.

In short, the compulsory minimum tariff has the effect either of stabilizing fees by preventing possible reductions or of artificially inflating them.

1.1.2 The effects on quality

In the opinion of the *Office*, the inflation of fees caused by the minimum compulsory tariff is not compensated by corresponding guarantees concerning the quality of services. It cannot, in fact, be assumed that a direct relation exists between fees and the quality of services and, even if it did exist, a fee-quality relation does not imply that there is a tariff-quality relation; there is no guarantee whatsoever that professionals actually use any excess remuneration created by the tariff to raise the standards of their services.

Take, for example, a high-quality service which cannot be rendered by a professional without the assistance of specialized technicians who command high wages. Should it prove necessary, in the interests of the public, to adopt a measure to maintain the quality of these services, this measure should consist, not in setting fees by tariff, since this would in no way guarantee the use of competent technicians, but rather in obliging professionals to employ qualified personnel by means of regulatory or legislative measures. Thus the fee-quality relation that may be seen at work in the above example does not imply a tariff-quality relation.

The *Office* is of the opinion that, basically, the skill and integrity of the professional rendering a service are the principal factors determining the quality of that service. The preservation and development of these characteristics is one of the basic objectives of the Professional Code and the main justification for the power which the professional corporations have been given over their members. If the quality of certain professional services cannot be ensured by the above means without a minimum tariff to maintain fees,

then it is the very principle of self-management among the members of these corporations that should be reconsidered. The *Office* would also like to point out that, in professions without a minimum tariff, the quality has been maintained. This is true both in Québec and in the other provinces where such tariffs are uncommon.

1.1.3 The effects on availability

The *Office* does not believe, either, that the compulsory minimum tariff constitutes a suitable way of ensuring that services are available since the various problems concerning availability must be resolved individually. For example, the general availability of services would not be guaranteed by applying a tariff but only by measures designed to modify, if necessary, the requirements governing the admission of new members into the professional corporations.

With respect to the question of regional distribution of services, it is shown in the report that a compulsory minimum tariff would be inoperative or superfluous. Rather, the solution is to be found in the creation of public networks, isolation bonuses or bursaries, or in a policy of subsidizing practices in under-served regions.

The *Office* considers, as well, that protecting small offices by means of a minimum fee policy is not advisable. Given the present coexistence of offices of varying sizes in professional sectors which have no minimum fee schedule, and in view of the guarantees for continued competition offered by the Combines Investigation Act, the *Office* is convinced that the absence of a minimum fee schedule does not pose a threat to the survival of small professional offices if they are dynamic.

In regard to the protection of professionals whose services are purchased by institutions, the *Office* is of the opinion that this role should be assumed by the professionals' union groups rather than by a regulatory tariff.

Moreover, in the case of corporations with reserved titles whose members are in competition with non-members, the availability of professional services is more likely to be endangered than promoted by the creation of a minimum fee schedule.

Given the above, the *Office* recommends that the government not only decide against extending the compulsory

minimum tariff system to other professions, but also that it abolish existing tariffs.

1.2 Maximum tariffs

The *Office* has looked into the adoption of another type of tariff providing for a compulsory maximum fee* and designed to promote the financial accessibility of services. However, it appears unrealistic to establish such a tariff in the present circumstances since recent government policy concerning accessibility has, in fact, been based more on offering free services (employment of professionals in public establishments, health insurance, legal aid) than on limiting fees.

Furthermore, the *Office* does not believe that this kind of tariff can advance the desired objective of accessibility. Since the limit set must be high enough to reflect the specialization, experience, reputation or isolation of certain practitioners, it is to be feared that

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* the maximum tariff itself, fixed tariffs and tariff ranges

the maximum fees would be so attractive, they would soon be charged by almost all the professionals in the field. With the maximum fee thus becoming the rule, an increase rather than a reduction in prices would result.

1.3 Recommended fee schedules

Having rejected the compulsory tariff as a means of effectively regulating fees or improving the quality and availability of services, the *Office* does not see how it could come to a different conclusion with regard to the recommended tariff whose use would be voluntary.

As far as quality and availability are concerned, the situation seems perfectly clear. Since no significant link could be found connecting maintenance of quality and availability of service with a compulsory tariff, it is even less likely that one would be found with a simple recommended tariff.

The question is slightly different, however, when fees for professional services are under consideration. It is obvious that a compulsory tariff can control these fees, but the same cannot be said of a recommended tariff. Even though reducing fees or limiting increases appears to be necessary in certain professional sectors, it is hard to see how the introduction of a tariff suggesting fees lower than the going market rate would help. It is reasonably certain that such a guide would to all intents and purposes be ignored by professionals, since it would be aimed at a market already favourable to them and one which enables them to set their fees at a very high level.

Furthermore, supposing that an increase in fees were to be seen as the only way to assist professionals in a given sector, it would probably be of very little use merely to suggest fees higher than the market rates: their weakness vis-à-vis the market might not allow the professionals to charge the recommended fee, and only a compulsory tariff could ensure the necessary increase.

The recommended tariff, then, is not considered by the *Office* to be a satisfactory instrument for regulating either the quality and availability of professional services or the fees charged.

Moreover, the *Office* does not believe recommended tariffs play a useful role in informing the public. In addition to the difficulties involved in making it known to the public, the fee schedule is often complex and much too general to allow the client to compare beforehand the actual fees charged by each professional.

In addition, recommended tariffs, intended to act as a means of informing the public about fees for professional services, have the paradoxical effect of endowing professionals with an official bargaining instrument which allows them to raise their fees. Because many professionals have a vested interest in referring to the tariff when setting their fees, for the consumer even a recommended tariff can have unfavourable inflationary effects closely related to those of the compulsory minimum.

Consequently, the *Office* has concluded that setting tariffs of professional fees cannot be justified, either by the results that have traditionally been attributed to it, quality and availability in particular, or by the effect it might have on fees for professional services. There is no reason at all to add fee-setting to the already imposing number of regulations which exist in the professional services sector: the *Office* does not see why professionals should be insulated against the laws of the open market by regulations highly favourable to them.

Although setting a tariff of professional fees is not necessary for the protection of the public, and may even be harmful, this is not to say that nothing can be done about fees for professional services. On the contrary, this conclusion has led the *Office* to opt for another possible procedure for the regulation of fees which consists in replacing fee-setting with certain measures intended to create more effective fee competition.

2.0 Establishing measures conducive to price competition in professional services

The framing of measures encouraging price competition does not call for radical changes within the

professional services market. Indeed the *Office* considers such a policy to be compatible with the nature of the professional services sector where there already exist a number of factors conducive to such competition, whether they be forces inherent in the professional services market or legislative measures prohibiting any existing practices which may restrict competition.

2.1 Factors encouraging price competition

The report published by the *Office* indicates that there exist four potential factors affecting price-competition for professional services and that their influence varies from one profession to another. The first of these factors is the initial investment made by the professional to acquire the necessary capital of knowledge. Often enough, he only has a relatively modest financial outlay to make in order to set up his practice and compete with other professionals. Moreover, the large number and varying sizes of practices found in the majority of the professions result in a market more or less free of monopolies, where favourable conditions exist for competition on account of the vast choice of practitioners available to the consumer.

The second factor affecting competition is the fact that under certain circumstances the consumer may substitute for the professional services he needs another service he considers equivalent which is offered at a price that suits him. In this way, he is able to choose between a professional with reserved title and a person who does not belong to a corporation; between a professional in private practice and his counterpart in a public establishment; or between a dentist and a denturologist, for example, for certain dental prostheses.

Thirdly, the bargaining power of the institutional client — its large demand for professional services and the fact that it is better informed than the individual client — may constitute a constraint on unwarranted increases in fees and may to a certain extent benefit the individual client. This competitive force plays an especially important role in the case of the corporations working in the fields of engineering, planning, business and law.

Finally, even in the professional services sector, the consumer may be able to compare the prices of commodities and even of certain services that are carried out in

a sufficiently standardized manner to be identified and priced by the public. In this context are included the initial consultations in various professions; for example, periodic dental checkups, the preparation of marriage contracts entailing the usual gifts between future consorts, the filing and hearing of uncontested divorce petitions, and animal vaccinations.

To these natural forces which affect to a different degree almost all those professions with members in private practice must be added the Combines Investigation Act which has applied to the professional services sector since July 1, 1976, and which tends to promote competition. As far as the professional is concerned, the main prohibitions affect agreements to restrict competition, mergers and monopolies, price maintenance, unwarranted price cuts, bid-rigging and publication of misleading information.

The act lends weight to the position of the *Office* by guaranteeing that, in the absence of regulatory

fee schedules, there will still be certain rules controlling fee-setting on the professional market. These legislative measures and the natural market forces which are conducive to price competition for professional services have prompted the *Office* to recommend measures designed to increase the effectiveness of competition which, at the moment, is potential rather than real.

2.2 Measures designed to guarantee the availability of services

The presence of factors conducive to price competition for professional services and the abolition of regulatory fee schedules advocated by the *Office* cannot by themselves guarantee effective competition. This can only be ensured by action intended to modify certain of the existing rules in the professional service market.

The *Office* believes, in fact, that it is an illusion to think that true competition will affect fees for professional services unless supply is sufficient,

in other words, unless the number of professionals rendering the services is high enough to meet the demand adequately.

2.2.1 Exclusive right to practise and the delegation of acts

It must be recognized that, when the exclusive right to practise is granted to a group, the numbers of the producers of services are limited and it becomes difficult to adjust the definition of fields of practice to the requirements of efficient distribution. The availability of services is consequently affected.

With regard to this difficulty, delegation of professional acts can ensure a greater availability of services by enabling persons other than the members of a profession with the exclusive right to practise to perform certain acts normally reserved to the latter. For example, doctors can delegate acts to the nursing staff, thereby making the service more available as well as allowing the doctors to spend more time on acts not delegated.

Since the present legislation allows delegation of acts for only seven of the 21 corporations with an exclusive right to practise, the *Office* recommends that this regulatory power be extended to all the professions holding exclusive rights to practise.

The *Office* also recommends that its suppletory power be extended to cover the 21 corporations concerned, enabling it, if required, to adopt or amend a regulation delegating acts in the stead of a corporation.

2.2.2 Control of entry into professional corporations

The control of admission into the professions was entrusted to the professional corporations with a view to ensuring the quality of services offered the public. At the present time, a person must usually fulfill two requirements in order to obtain a permit from a professional corporation: obtain a recognized diploma or have the corporation approve an equivalent diploma or training, and, if the corporation so requires, comply

with other conditions such as a practicum or an examination.

However, the adoption by a corporation of regulations respecting equivalences and additional conditions is optional. The *Office* therefore recommends that a suppletory regulatory power comparable to that it has in several other fields be granted, so that it can adopt or amend such regulations in the public interest, if a corporation fails to do so. Indeed, it is essential to prevent the powers held by the corporations from being used to limit unduly the admission of new candidates — a danger cited by several investigatory and consultative bodies during the last few years.

With regard to regulations respecting diploma or training equivalences, the *Office* recommends that certain procedures designed to guarantee the individual rights of the person concerned be incorporated into the legislation, as has been already done, for example, in Ontario with respect to admission to certain medical professions. Among the above procedures would be included the right to a hearing, written justification of the decision and the right of appeal.

The *Office* believes that if these few recommendations are implemented, the mechanisms of professional regulation which have a direct bearing on the availability of services will not be an obstacle except to the extent required to protect the public.

2.3 Measures respecting information on professional services

Whatever the market where producers and consumers meet, the information available has a major impact on efficiency and price levels. In effect, if the consumer knows what products and services are available on the market and their cost, he can secure what he needs at the price that suits him. Enlightened decisions made by consumers in this way enable producers to adjust their output and prices in terms of real consumer needs. The result is better use of resources and better knowledge of needs.

2.3.1 Information about activity sectors

The *Office* also recommends that the professionals be permitted to inform the public about their activity sectors. It may be very useful to the prospective client, in view of his needs, to know that a lawyer specializes in labour law just as it is very important for the professional to make known his main field of interest and the area in which his experience is greatest.

To be useful to the consumer, however, the *Office* believes that this authorization ought to be based on specific norms established in the regulations respecting advertising. Moreover, this type of consumer information should, in the opinion of the *Office*, be supplemented by information distributed by the professional corporations themselves. It is in fact important that the corporations inform the public of the various activity sectors for which their regulations authorize publicity and explain the principal types of services offered in each sector.

2.3.2 Information about fees for professional services

Knowledge of the price of professional services can also assist the consumer in making his choice. The existing regulation which prohibits the professional from diffusing this type of information deprives the consumer of the advantages of competition and of his right to be suitably informed. Furthermore, the spirit of these regulations can be prejudicial to the relations existing between the client and the professional as bear witness the many complaints addressed to the *Office* arising out of a misunderstanding on the question of fees.

The *Office* therefore believes that information concerning the price of professional services must be made available and that, subject to future discussion with the corporations, the members of most of the professional corporations should be allowed to make known to the public one or more of the following pieces of information with regard to their fees for services:

(1) hourly rate: although the consumer cannot always assess the number of hours the service will require, an hourly rate gives a means of comparing prices so that he can determine which professional charges the fee he is prepared to pay;

(2) percentage charged: while in no way wishing to make a value judgement of this method of calculation, the *Office* nevertheless notes that if the amount to which the percentage is applicable is known to the client it is possible for him to estimate precisely the fee;

(3) the price of fairly standard goods and services: this information makes it possible to compare prices not only in the case of goods such as medication, glasses, contact lenses and prostheses but also in the case of various standard services;

(4) a written estimate of fees for services: a written estimate is undoubtedly an effective way of helping the consumer obtain the service he desires at the price which best suits him on the market.

In addition, the *Office* believes that the professionals should be obliged by their codes of ethics to furnish their clients with a detailed bill in which the consumer could check that the fees charged corresponded to the advertised cost and to the service rendered.

The above recommendations proposed by the *Office* respect the spirit of a vast movement which calls for a more open information policy with regard to professional services and which is presently active in the United Kingdom, the United States and Canada. In its report, the *Office* describes at length the movement which seems to be gaining momentum[1].

2.3.3 Maintenance of certain restrictions

Although it subscribes to the school of thought calling for more open information on the professional activity sector, the *Office* is not in favour of making all types of information accessible.

In the opinion of the *Office*, the dangers of publicity which sometimes encourages needless spending or even misleads the consumer must be eliminated. Consequently, it recommends that the stipulation according to which a professional may not advertise his own abilities and the quality of his services be maintained on account of the

(1) On June 27, 1977, when the report of the *Office* was in the press, the United States Supreme Court handed down a decision in an action brought by the State Bar of Arizona against two lawyers for having advertised in a newspaper their fees for various types of services (divorce, adoption, bankruptcy, change of name). The Supreme Court ruled that prohibiting lawyers from advertising their fees for certain standard services is contrary to the American Constitution because it violates the right to freedom of expression and the right to be informed.

subjective nature of the information and the difficulties implied in its appreciation by the public. In addition, the *Office* believes that, given the special nature of the professional services sector and the novelty of the measures it is proposing, it would be prudent, for the moment, to maintain the existing restrictions with respect to the mechanisms of disseminating information and the frequency and size of advertisements.

In short, the *Office* suggests maintaining existing rules which prohibit all advertising by professionals other than that expressly permitted by regulation, provided that the latter category is amended to include the dissemination of information about fees and activity sectors.

Conclusion

The measures proposed by the *Office* for promoting healthy competition between practitioners should enable the professional services market to function more effectively and result generally in benefits to the consumer with regard to the level of fees.

The absence of a regulatory fee schedule will in fact make possible a greater flexibility in fees because professionals will no longer be obliged to respect the floor price established by regulations and will be able to set their fees on the basis of special factors.

The measures respecting the availability of professional services will contribute indirectly to maintaining this competition. In fact, although they will not eliminate the various circumstances that can restrict access to the professions, these measures will nevertheless ensure the existence of more diversified entry mechanisms, offer better guarantees to candidates for professional practice and make possible the adaptation of fields of practice to the real needs of the market, thus favouring the maintenance or improvement of the situation as regards availability of professional services.

Finally, the measures respecting information on professional services will enable the consumer to know more exactly how his needs can be met and at what price. This fuller information, combined with the possibility for the professional of reducing his fees, will change to the consumer's advantage the conditions in which the contract

for professional services is negotiated. It will then be less a standardized contract and more a freely negotiated agreement between two autonomous individuals, able to profit from what the market offers.

Recommendations of the *Office des professions du Québec* published in its report "Professional Fees in Private Practice: the Question of Regulation".

1. THAT section 12(u) of the Professional Code be amended to make the power of the *Office* and the government to set fee schedules optional rather than mandatory, and that this power be used only when deemed necessary (p. 8)*;

2. THAT section 12(u) of the Professional Code, which grants the right to set fee schedules, be amended to allow the application of such power exclusively to professional services rendered in private practice, the fees for which are not determined by law (pp. 13 and 24);

3. THAT section 126 of the Bar Act be amended to abolish the Bar's power to set extrajudicial fee schedules for its members and that such fee schedules, if deemed necessary, be established only in accordance with section 12(u) of the Professional Code (p. 23);

4. THAT section 102 of the Notarial Act, under which the Order of Notaries has the power to establish fee schedules for its members, be repealed, and that such fee schedules, if deemed necessary, be established only in accordance with section 12(u) of the Professional Code (p. 23);

5. THAT, subject to recommendations 6(d) and 7, the principle of regulatory professional fee schedules be rejected, whether they be

   (a) obligatory regulatory schedules giving:

   - a minimum (p. 100);
   - a maximum (p. 122);
   - a fixed fee (p. 131);
   - a range (p. 134); or

   (b) recommended regulatory fee schedules (p. 161);

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* The above page numbers refer to the report "Professional Fees in Private Practice: the Question of Regulation" published by the *Office des professions du Québec*.

6. THAT pursuant to recommendation 5:

   (a) the agronomists' tariff of professional fees be abolished;

   (b) the architects' tariff be abolished;

   (c) the tariff of the Land Surveyors and Geometers of Québec be abolished and the references in the Land Surveyors Act to the fee schedule that must be adopted under the Professional Code be dropped (note 23);

   (d) the provisions in Regulation No. 1 of the Bar of Québec constituting the extrajudicial fee schedule be repealed, with the exception of the 30% maximum, which should be retained until the *Office* has made a study of the effects of the practice of contingent fees to which this maximum is an obstacle (p. 124);

   (e) the tariff of professional fees of the Professional Corporation of Chartered Appraisers be abolished;

   (f) the engineers' tariff of fees be abolished;

   (g) the tariff of fees of members of the Corporation of Forest Engineers be abolished;

   (h) the tariff of fees of urbanists be abolished;

7. THAT under section 12(u) of the Professional Code, the notaries' tariff of fees be replaced by a fixed or maximum fee schedule applicable to services for which a person pays without having had a choice of notary. However, if, after discussion between the *Office* and the Order of Notaries, it were considered that the abuses which might result from this situation could be prevented by some other means - for example, amendment of section 26 of the Notarial Act to stipulate that the person who has the choice of notary according to this section must pay him - the notaries' tariff of fees should be abolished (pp. 137-138);

8. THAT an amendment to the Professional Code strictly prohibit the establishment and circulation of fee guides to professional corporations (p. 163);

9. THAT the government study the means of correcting the difficulties experienced by consumer groups in asserting their point of view with as much force as the producers before the public regulatory agencies (p. 119);

10. THAT the legislation governing the professions be amended to grant to all the professional corporations with an exclusive right to practise the power to delegate professional acts and this power be subject, as in the case of the corporations that now have it, to the suppletory power of the *Office* which enables it to adopt or amend a regulation respecting delegation of acts in the stead of a professional corporation if it fails to do so (pp. 203-204);

11. THAT the Professional Code be amended to grant the *Office* a suppletory regulatory power over admission to professional corporations which would enable it to adopt and amend, in the place of a professional corporation that failed to do so, any regulation respecting:

    (a) recognition of diploma and training equivalences (p. 212);

    (b) determination of additional conditions, such as a practicum or an examination, required for issuing permits (p. 212);

12. THAT the Professional Code be amended to require that, with respect to admission to professional corporations, the decision of the board of a corporation not to recognize a diploma or training equivalence:

    (a) not be made without the person concerned having an opportunity to be heard by the board or a committee appointed by it (pp. 214-215);

    (b) state the reasons in writing, including a description of the program of study, practicum or examination required to obtain an equivalence (p. 215);

    (c) be open to appeal before the Professional Tribunal (p. 215);

13. THAT with regard to advertising permitted professionals, the present general rule prohibiting all publicity except where expressly authorized be maintained, with the object in particular of prohibiting advertising by professionals respecting the quality of their services (pp. 240 and 257);

14. THAT professional corporations in which various activity sectors can be identified amend their regulations respecting advertising explicitly to enable their members to inform the public of the fields on which they concentrate or to which they restrict their practice, within the scope of the norms provided in the regulations (pp. 246-247);

15. THAT the professional corporations take the necessary measures to inform the public of the various activity sectors of which they permit mention by their members and to make known the principal types of services offered in each of these sectors (pp. 248-249);

16. THAT, in particular, the Bar amend its regulation respecting advertising in order to enable lawyers, within the norms stipulated in the regulation, to inform the public of the activity sectors on which they concentrate or to which they restrict their practice (p. 252);

17. THAT the professional corporations amend their regulations respecting advertising explicitly to enable their members to give the public certain information regarding the fees for their services, notably one or more of the following particulars (pp. 258-259):

    (a) their hourly rate;

    (b) the percentage they charge;

    (c) the price of certain fairly standard goods or services;

    (d) the fact that they agree to furnish on request a written estimate of the fees for their services.

18. THAT the professional corporations amend their codes of ethics to oblige their members to supply clients with a detailed statement of their fees (pp. 263-264);

19. THAT the professional corporations amend their regulations respecting advertising to enable their members to post the fees for their services in their offices (p. 266);

20. THAT generally speaking information regarding the activity sectors on which professionals concentrate or to which they restrict their practice and the fees for their services be circulated through the written media now authorized by the corporations' regulations respecting advertising (p. 267).